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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~300~~ 16

ANDREW G. NELSON, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY TO MOTION TO AFFIRM.

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vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY TO MOTION TO AFFIRM.

The points made in the Government's[1] Motion to Affirm will be replied to in order.

1. The Government's reasoning seems to be (a) the Commission's rulings are presumptively correct; (b) its interpretation of the phrase "*stock* in trade of drug stores" in appellant's permit was correct even without the presumption; and, in any event, (c) the meaning of such an isolated phrase in a particular permit is not a question with which this Court need be concerned. However, in its attempt to under-play the significance of this case,

1. The United States and the Interstate Commerce Commission have filed a joint motion to affirm and will be referred to, collectively, as the Government.

the Government has ignored the really important questions involved—questions that do deserve this Court's consideration.

To be sure, appellant does believe that the Commission erroneously interpreted the commodity description in its permit but also inextricably involved in this case are such questions as: (1) whether or not, under the guise of interpretation, appellant has been deprived of operating rights guaranteed by Section 209 (a) of the Interstate Commerce Act, Part II; (2) whether or not the Commission can ignore evidence concerning events underlying the issuance of appellant's permit in ruling that appellant has transported commodities not authorized by that permit; (3) whether or not the Commission can construe the plain language of the permit in the light of a refinement in its commodity description technique subsequently developed to effectuate a new policy; (4) whether or not the Commission's action violates the precepts of this Court's decision in *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947); (5) whether or not the district court's affirmance of the Commission's action involves a conflict with *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954) and *Bird Trucking Co.* v. *United States*, decided September 26, 1955 (W. D. Wis.), 11 Federal Carriers Cases, par. 81,628; and (6) whether or not the Commission's report and order run afoul of the requirements of the Administrative Procedure Act.

In order to put these questions in their proper perspective, we should consider the Commission's purpose in attacking appellant's operations in this case. Since the beginning of motor carrier regulation, the fact that a substantial number of carriers had grandfather rights under Section 209 (a) of the Interstate Commerce Act, Part II, has caused the Commission considerable difficulty. Applications for grandfather permits were handled infor-

mally in most cases (*Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 295 (fn. 3) (1948)), and the Commission had trouble in attempting to classify the operations of carriers who had grandfather rights (*Classification of Motor Carriers of Property*, 2 M. C. C. 703 (1937)). As a result, the Commission perhaps was not as careful as it should have been in choosing language to describe the commodities authorized to be transported in the early grandfather permits. *Descriptions in Motor Carrier Certificates*, 61 M. C. C. 209, 211 (1952). Later, the Commission realized that its carelessness had been a mistake. Because the Commission was required by law to issue to grandfather carriers permits commensurate with the scope of their business during the grandfather period, it had no means of regulating or restricting their operations except by making sure that their permits accurately described their grandfather operations so as to grant no more operating authority than the mandate of Congress required. See the concurring opinion of Chairman Eastman in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, 498-499 (1939). In an effort to mitigate the effect of its earlier carelessness on its future regulatory policies, the Commission began to devise ways of restricting the scope of grandfather carriers' operations—sometimes exceeding its statutory authority and necessitating restraining action by the courts.[2] Therefore, because of the history of the Commission's approach toward holders of grandfather permits, it can reasonably be assumed that, in initiating the investigation which ultimately led to the order under review, the Commission's underlying purpose was to constrict as much as possible the scope of appellant's operating authority

2. See the discussion of this subject in the Jurisdictional Statement, pp. 15-21. See also the perspicacious concurring opinion of Judge Fee in *Johnson* v. *United States*, 41 F. Supp. 188, 190 (Oregon 1941).

inasmuch as that operating authority was broader than the Commission's current policies would have permitted.[3]

Once the Commission's underlying purpose is understood, the evils inherent in the strategy and tactics by which it accomplished its purpose also became apparent. Appellant's predecessor was authorized, in 1942, to haul "*stock* in trade of drug stores." The Commission now interprets this phrase to mean "stock in trade *intended for* drug stores." (Motion to Affirm, p. 4. Italics supplied.) The contrast between these two phrases is striking. The Commission arrived at its so-called interpretation by (a) applying its subsequently developed intended use test and (b) by refusing to consider evidence as to

3. Appellant's assumption with respect to the Commission's purpose is supported by the fact that this whole proceeding was initiated in 1954 by an order of the Commission which, when reduced to its lowest terms, recited that appellant had been hauling certain enumerated commodities not within the scope of its permit and then ordered a hearing to be held to determine whether or not appellant had been hauling commodities not within the scope of its permit. (R. 23.) Obviously, such an order presaged a foregone conclusion that appellant had violated the terms of its permit and indicated that the hearing would be a mere formality. If the Commission had been convinced (as apparently it was) that appellant's operations were *ultra vires*, the most direct approach would have been to apply to the district court for an injunction under Section 222 (b) of Part II of the Interstate Commerce Act (49 U. S. C. 1952 ed., Section 322 (b)). Instead, the Commission chose to initiate an investigation under Section 204 (c) of the Act—a proceeding which would appear to be appropriate only where the Commission was seeking facts, not where it already had sufficient details concerning the alleged violations to draw what amounted to a bill of particulars. No doubt the Commission chose this method of attacking appellant's operations because it had been denied an injunction in an almost identical situation by the same district court to which it would have had to apply for an injunction against appellant. *Interstate Commerce Commission* v. *Ratner*, decided April 15, 1947 (N. D. Ill.), 6 Federal Carriers Cases, par. 80,415. By choosing to bring the case up through its own administrative tribunal, the Commission was able to approach the district court (and now approaches this Court) with the benefit of a presumption of the correctness of its own interpretation of appellant's permit. (Motion to Affirm, p. 4.)

the events underlying the issuance of appellant's permit either as an aid to construction or, if its construction is correct, as an indication that appellant's permit is not as broad as the nature of its predecessor's business during the grandfather period warranted. The Government begs the question when it states that construing a permit merely determines what rights a carrier had from the beginning. (Motion to Affirm, p. 3.) If, in fact, the Commission's so-called interpretation of appellant's permit deprives it of operating rights granted either by the language of the permit[4] or by the grandfather clause of the Interstate Commerce Act,[5] its action is unreasonable and unlawful and must be condemned now, before appellant's business is ruined[6] and before other carriers are subjected to similar treatment.

(a) Appellant objects to the application of the intended use test to its permit because it is a test which was devised subsequent to the issuance of the permit[7] to ef-

4. If, inadvertently, the permit granted operating rights in excess of what the Commission intended, the error cannot be corrected at this time under the guise of interpretation. *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 302 (1949).

5. If the challenged commodities are of the same kind as were hauled during the grandfather period, appellant has a right to haul them now, regardless of what the language of the permit is now construed to mean. *Bison Freight Lines* v. *Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954).

6. As interpreted by the Commission, appellant's permit, insofar as it relates to authority to haul "*stock* in trade of drug stores", is meaningless. It would be impossible, business-wise, to require interstate shippers of such merchandise as is sold in drug stores to earmark their merchandise for drug stores rather than, for example, department stores.

7. Despite the Commission's self-serving declaration (quoted by the Government in its Motion to Affirm, p. 4) that it has defined authorized commodities by their intended use "from the beginning", we have been unable to find (and the Commission has never cited) any application of such a test prior to *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M. C. C. 567

fectuate a new policy of the Commission[8] and because, as applied to appellant's permit, it changes the meaning of the plain language of the permit.[9]

(b) Appellant also feels that it is very important to establish the role of evidence concerning events underlying the issuance of grandfather permits in the construction of those permits. This evidence is of two types (both of which are involved in this case): (1) evidence of the nature of the grandfather operations and (2) evidence of the circumstances surrounding the issuance of the permit. The first is important in determining whether the permit granted accurately reflected the grandfather operations, as it was required by law to do; both are important in determining what was intended by the particular language used in the permit.

At the beginning of the hearing before the Commission's examiner, the Bureau of Inquiry and Compliance's counsel took the position that evidence concerning appellant's predecessor's grandfather operations was admissible because the language of the permit was ambiguous. (R. 155.) Presumably, this was done because much of the

(1949), and it was not then well enough developed to be labelled as such in that case. (See Jurisdictional Statement, p. 17, fn. 10.) Moreover, the Commission has said that an intended use commodity description is one which is coupled with a "Keystone" restriction, *i. e.*, one which restricts the class of shippers for whom the described commodities can be hauled (*Dart Transit Co.—Modification of Permit*, 49 M. C. C. 607, 612 (1949)); whereas appellant's permit, though issued in 1942 when "Keystone" restrictions were well known (see Jurisdictional Statement, p. 16), contains no such restriction and none can be implied (*Vidas Contract Carrier Application*, 62 M. C. C. 106, 107 (1953)).

8. See the discussion of this problem in the Jurisdictional Statement, pp. 17-20.

9. The Commission has said that restrictions on operating authority must be expressed in the permit, not implied. *Coastal Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 299 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 188-189 (1949).

Commission's documentary evidence indicated that Nelson's grandfather operations were restricted to hauling for Walgreen Drug Stores. (Jurisdictional Statement, p. 8.) However, during the hearing, Nelson explained (1) that his operations had actually been much broader and (2) that the documentary evidence had been virtually dictated by the Commission's own personnel, who told Nelson that that was all he needed to submit to get the kind of permit he wanted. (Jurisdictional Statement, pp. 7-9.) In the face of this testimony, the Bureau changed its position before the Commission and claimed that no underlying evidence should be considered because the permit was unambiguous. (Jurisdictional Statement, p. 30.) Both the hearing examiner and the Commission agreed with the Bureau, although the examiner did make findings which were based upon that portion of the documentary evidence which supported the Commission's position and wholly ignored both documentary evidence favorable to appellant and Nelson's explanatory testimony without even mentioning it to reject it. (Jurisdictional Statement, pp. 30, 36, 38-39.) This cavalier treatment of the underlying evidence should not be permitted simply because the Commission ultimately decided to rule that the language of the permit was unambiguous.[10] Practically all of the documentary evidence and testimony presented at the hearing by both sides related to events preceding the issu-

10. The Government cites two cases in support of its contention that the underlying evidence was properly ignored. (Motion to Affirm, p. 4.) In *Bingler Vacation Tours*, the phrase to be interpreted had a well-established meaning when the certificate was issued. There has never been any suggestion that "*stock* in trade of drug stores" had such a meaning. In *Pomprouritz*, the Commission itself had used evidence of the carrier's grandfather operations to show that his construction of the permit did not conform to the limited scope of those operations. *See Pomprouritz Extension—Packing House Products*, 51 M. C. C. 343 (1950). Thus the Commission apparently considers a permit ambiguous or unambiguous, depending on which serves its own purpose.

ance of the permit and, as a practical matter, the Commission and the courts almost always consider such evidence in construing grandfather permits. See, for example, *Black* v. *Interstate Commerce Commission*, 167 F. 2d 825 (C. A. 5, 1948), certiorari denied, 335 U. S. 818; *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954); *Bison Freight Lines* v. *Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954).

Evidence concerning Nelson's grandfather operations should have been considered for two reasons. First, Nelson had applied for a permit to haul *general merchandise* (exactly what the evidence shows he was in the business of hauling), but, in its compliance order, the Commission recited that he had applied for a permit to haul *stock in trade of drug stores*, found that he had operated in such manner, and ordered the permit issued accordingly. (Jurisdictional Statement, pp. 8-10.) This alone indicates such an ambiguity in the circumstances surrounding the issuance of the permit as to warrant consideration of the nature of the grandfather operations in construing the intent of the Commission in issuing the permit. *Salvino* v. *United States*, *supra*, p. 284. Second, even if the Commission had intended to issue a permit limiting Nelson's operations to hauling stock in trade *intended for* drug stores, the operating authority would not have been co-extensive with Nelson's grandfather operations, as required by Section 209 (a) of the Interstate Commerce Act, Part II, and appellant would be entitled to have its permit altered accordingly.[11] *Johnson Truck Service* v. *Salvino*, 63 M. C. C.

11. The Government accuses appellant of seeking an interpretion that would permit appellant to haul all merchandise which "conceivably" might be sold in drug stores, which would be tantamount to a general commodity authorization in view of the myriad commodities now handled by drug stores. (Motion to Affirm, p. 3.) Actually, appellant claims only the right to transport commodities "ordinarily" found for sale in drug stores. (Jurisdictional Statement, pp. 14-15.) The question of whether

1 (1954); *Grifall Common Carrier Application*, 62 M. C. C. 763 (1954); *Fleetlines, Inc.* v. *Osbcurn Trucking Co.*, 51 M. C. C. 221, 229 (1952). The Commission can refuse to consider evidence concerning grandfather operations only if a permit accurately reflects those operations. *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 191 (1949).

As we pointed out in the Jurisdictional Statement (pp. 19-20), the three-judge district courts in the *Salvino* and *Bird* cases refused, in circumstances similar to those involved in this case, to allow the Commission (1) to ignore evidence concerning events which preceded the issuance of the grandfather permits whose interpretation was in question and (2) to construe the language of those permits in the light of definitions and policies evolved after they were issued. The Commission's action in this case (and the affirmance of that action by two of the three judges of the district court) is squarely in conflict with the principles enunciated in those cases. Resolution of that conflict by this Court is important to all holders of grandfather permits or certificates.

We might add that, to appellant, there was no ambiguity in the phrase "*stock* in trade of drug stores" until the Commission insisted upon superimposing the intended use test in construing the phrase. Therefore, the problem of ambiguity and the consequent necessity of examining the evidence underlying the use of that language in the permit was created by the Commission itself.

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or not appellant can transport commodities ordinarily found for sale in drug stores today, but not when its permit was issued in 1942, is not involved in this case because there was uncontroverted testimony at the Commission hearing to show that the commodities allegedly hauled in violation of appellant's permit were carried as part of drug stores' stock in trade then as well as now. (R. 254-257, 264, 273.)

2. Appellant contends not only that the Commission failed to make findings concerning grandfather operations as the Government seems to assume (Motion to Affirm, p. 5), but also that, even if the examiner's findings are considered to have been adopted by the Commission (a doubtful point—see Jurisdictional Statement, fn. 21), they are unsupported by substantial evidence. (Jurisdictional Statement, pp. 21-22.)

3. Appellant's objections as to the vagueness and indefiniteness of the Commission's cease and desist order are not captious. The go not to the fact that the injunctive provisions of the order are contained in its report, by reference, but to the fact that the report itself is extremely confusing. (See Jurisdictional Statement, pp. 23-24.) None of the cases cited by the Government (Motion to Affirm, p. 6) involved cease and desist orders which referred to reports as full of uncertainties as is the one with which appellant would be expected to comply.

CONCLUSION.

Appellant's only protection against the Commission's effort to implement its current policies is the Congressional mandate to the effect that the holders of grandfather permits are entitled to carry on operations commensurate in scope with the grandfather operations upon which their permits are based and the duty and power of the courts to review the Commission's action in order to make sure that the Congressional mandate has been followed. *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49. In addition, the questions involved in this case are far broader than the mere interpretation of the special language of appellant's permit.

For these reasons, appellant requests that this Court deny the Government's Motion to Affirm and note probable jurisdiction.

Respectfully submitted,

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October, 1956.